

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS MOORE,

Defendant-Appellant.

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UNPUBLISHED

July 9, 2002

No. 228323

Wayne Circuit Court

LC No. 80-005947

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's denial of his motion for reconsideration of the court's denial of his motion for relief from judgment or for a hearing regarding resentencing. We reverse and remand for further proceedings.

On August 28, 1981, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, following a bench trial. He was sentenced to life imprisonment for the second-degree murder conviction and the mandatory two years for the felony-firearm conviction.

In April, 1984, defendant filed a motion for resentencing, arguing that he should be resentenced because the sentencing court mistakenly believed that he would be eligible for parole after ten years. The prosecutor argued that the motion was premature because defendant had only served three years and had not yet been denied parole. The trial court agreed and denied the motion. This court denied leave to appeal that denial.

In July 1997, defendant filed a motion for relief from judgment or for an evidentiary hearing. This motion was initially denied by a judge other than the sentencing judge, but, in response to a motion for reconsideration, that judge granted reconsideration and reassigned the matter back to the sentencing judge.

The sentencing judge held a hearing on the matter. He concluded that defendant was not barred from raising the claim based on the 1984 motion, because the earlier motion was denied not on the merits, but because the matter was not ripe. Addressing the merits of the motion, the sentencing court concluded:

I think that under the *Johnson*<sup>1</sup> case, as I understand that case, that [defendant] has not become eligible for parole.

Now it was my intention that he become eligible for parole, but I don't think . . . I have jurisdiction to resentence him, notwithstanding the fact that he, as a practical matter, has not become eligible.

Initially we agree that there was no procedural impediment to the court's consideration of defendant's motion. The court's decision in 1984 was based on the timing of the request for relief, not on the merits.

A sentencing court may not reevaluate its own discretionary sentence simply because it has changed its mind, *People v Wybrecht*, 222 Mich App 160, 168-169; 564 NW2d 903 (1997); a court may not modify a valid sentence after it has been imposed except as provided by law. MCR 6.429(A). Sentences based on a misconception of law are deemed invalid and subject to amendment by the sentencing court. *People v Miles*, 454 Mich 90, 96-97; 559 NW2d 299 (1997).

In the instant case, the sentencing judge stated that in sentencing defendant to life it was his intention that defendant become eligible for parole, and that given his "belief of how parolable life sentences work, it was [his] hope that he would be considered for parole." The court concluded that under *In re Parole of Johnson*, 235 Mich App 21, 22; 596 NW2d 202 (1999), defendant had not become eligible for parole. The sole question before us is whether, having so concluded, the court had jurisdiction to resentence had it chosen to do so.

We conclude that the court's conclusion that it was without jurisdiction to resentence was erroneous. Having found that it had sentenced under a "misapprehension or misunderstanding" regarding defendant's eligibility for parole after ten years, the court had authority to resentence, if it so chose.

In *People v Lino (After Remand)*, 213 Mich App 89, 98-99; 539 NW2d 545 (1995), overruled on other grounds *People v Carson*, 220 Mich App 662, 674; 560 NW2d 657 (1996), a panel of this Court held that because the sentencing court had sentenced defendant on remand to a greater sentence by sentencing him to parolable life, under the erroneous belief that it was a lesser sentence than had previously been imposed, defendant was entitled to resentencing. Of course, *Lino's* conclusion that a sentence of parolable life imprisonment is invariably a greater sentence than a sentence to a lengthy term of years was rejected by a conflict resolution panel in *Carson, supra*, 220 Mich App at 676-677, where the Court concluded that a sentence of parolable life and a sentence to a lengthy term of years are mutually exclusive concepts, and the Court need not speculate regarding at what point one becomes more severe than the other. The *Carson* Court held that

a trial court need not determine what sentence would constitute the absolute greatest punishment under some theoretical spectrum of sentencing severity.

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<sup>1</sup> *In re Parole of Johnson*, 235 Mich App 21, 22; 596 NW2d 202 (1999).

Rather, we require only that in imposing a proportional sentence the sentencing court is cognizant of the applicable sentencing law. [220 Mich App at 677.]

The instant case does not involve the issue that divided the *Carson* and *Lino* Courts. Defendant does not claim an entitlement to resentencing because his life sentence was disproportionate, being the most severe penalty possible. Rather, defendant argues that having determined that it sentenced defendant under the misapprehension that he would be eligible and considered for parole after ten years, the sentencing court had jurisdiction to resentence if it so chose, because it had sentenced under a misconception of the law.<sup>2</sup> This is, indeed, a separate question, and this Court has recognized that there is jurisdiction to resentence under such circumstance.<sup>3</sup> *Lino, supra*; *People v Biggs*, 202 Mich App 450, 456; 509 NW2d 803 (1993).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ E. Thomas Fitzgerald

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<sup>2</sup> Although the dissent focuses on whether there was a change in law, the relevant inquiry is whether there was a misconception or misapprehension of the law.

<sup>3</sup> We stress that defendant is not *entitled* to resentencing; rather, the court has jurisdiction to resentence if it determines that its misapprehension of the law affected its sentence.

As observed by the conflict panel in *Carson, supra*, sentencing judges are often faced with the decision whether to impose a life sentence or a term of years. The focus in doing so is not on statistics, or on the abstract question whether one sentence is more severe than another. Rather, these decisions are made based on all relevant facts. When it was routine for offenders sentenced to parolable life to be paroled soon after serving ten years, judges would sentence to long indeterminate terms to avoid that possibility when a longer sentence was thought necessary, and would sentence to life to permit relatively early parole based on good behavior. It does not follow, however, that in a case where the judge opted for the latter course that, had the judge had full knowledge that “life means life,” the judge would have sentenced to a term of years that would permit full consideration for parole after ten years. A judge imposing a sentence for murder under those circumstances might not have been comfortable with a ten or twelve year minimum term, and, if a parolable life sentence was not viewed as an alternative because too severe, may have chosen a term of years that would assure that the defendant would serve a minimum term in excess of the minimum term at which the parole board has jurisdiction to consider parole. In other words, a judge that chose a parolable life sentence with the belief that the defendant would be seriously considered for parole soon after ten years, and who did not feel obliged to sentence to forty to sixty years to avoid that possibility, may have imposed a twenty to forty year term if the judge had known that, in general, “life means life.”